

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Official
77-4192, 78-6032

To be argued by
ANNE SIDAMON-ERISTOFF

United States Court of Appeals

FOR THE SECOND CIRCUIT

Petition Docket No. 77-4192

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., ORANGE AND ROCKLAND
UTILITIES, INC., and POWER AUTHORITY OF THE STATE OF NEW
YORK,

—against—

Petitioners,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

—and—

Respondent,

HUDSON RIVER FISHERMEN'S ASSOCIATION,

Intervenor-Respondent.

Appeal Docket No. 78-6032

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., ORANGE AND ROCKLAND
UTILITIES, INC., and POWER AUTHORITY OF THE STATE OF NEW
YORK,

—against—

Plaintiffs-Appellants,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DOUGLAS
M. COSTLE as Administrator, U.S. Environmental Protection Agency,
ECKARDT C. BECK, Regional Administrator, Region II, U.S. Environmental
Protection Agency, NEW YORK STATE DEPARTMENT OF ENVIRON-
MENTAL CONSERVATION and PETER A.A. BERLE, Commissioner, New
York State Department of Environmental Conservation,

—and—

Defendants-Appellees,

HUDSON RIVER FISHERMEN'S ASSOCIATION,

Intervenor-Defendant-Appellee.

BRIEF OF RESPONDENTS-APPELLEES EPA, COSTLE AND BECK

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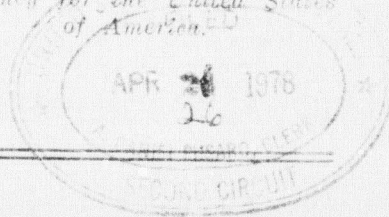




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EDISON COMPANY OF NEW YORK, INC., ORANGE AND ROCKLAND
UTILITIES, INC., and POWER AUTHORITY OF THE STATE OF
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Petitioners,

—against—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

—and—

HUDSON RIVER FISHERMEN'S ASSOCIATION,
Intervenor-Respondent.

Appeal Docket No. 78-6032

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Plaintiffs-Appellants,

—against—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DOUGLAS
M. COSTLE, ~~as~~ Administrator, U.S. Environmental Protection
Agency, ~~EDWARD C. BECK~~, Regional Administrator, Region II,
U.S. Environmental Protection Agency, NEW YORK STATE DE-
PARTMENT OF ENVIRONMENTAL CONSERVATION, and PETER A.A.
BERLE, Commissioner, New York State Department of En-
vironmental Conservation,

Defendants-Appellees,

—and—

HUDSON RIVER FISHERMEN'S ASSOCIATION,
Intervenor-Defendant-Appellee.

**BRIEF OF RESPONDENTS-APPELLEES EPA,
COSTLE AND BECK**

Issues Presented for Review

1. Should the petition be dismissed as untimely?
2. Does Section 402(c) (1) of the Water Act require EPA to terminate its adjudicatory hearings on petitioners' permits?

3. Did the District Court lack jurisdiction over appellants' action?

Statement of the Case

These are two consolidated cases. The first case, Docket No. 77-4192, is an original petition brought by Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Orange & Rockland Utilities Inc., and Power Authority of the State of New York (collectively "the Utilities") to review the determination of the United States Environmental Protection Agency ("EPA") that it rather than the State of New York retain jurisdiction to conduct certain adjudicatory hearings involving permits issued to the Utilities pursuant to the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (the "Water Act"). (The petition is reproduced at pp. 622-23 of the Joint Appendix.)

The second case, Docket No. 78-6032, is an appeal from an order and judgment of the Honorable Robert L. Carter, United States District Judge for the Southern District of New York, entered March 2, 1978 dismissing for lack of subject matter jurisdiction a similar action by the Utilities filed in District Court against EPA and two of its officials (collectively the "federal defendants" or "EPA") and the State of New York. (The District Court opinion is reported at 444 F. Supp. 628 and also reproduced at pp. 595-615 of the Joint Appendix.)

Statement of Facts

The petitioners-appellants, three utility companies and a public authority (collectively the "Utilities") are engaged in the generation and sale of electricity in the area of New York City and several nearby counties. The Utilities operate four generating stations at sites along the Hudson River, and in the course of their operations use millions of gallons per day of Hudson River water in "once-through" cooling systems for their plants, which

draw in and then discharge water back to the river.*
(JA 19-20, 73-76).**

Since the once-through cooling systems for the plants suck in river water, they impact on the river by killing or "entraining" (capturing in the water flow which goes through the cooling system) fish and fish eggs. They also discharge water back into the river at elevated temperatures, which is recognized by statute to be a form of pollution. The discharges are therefore subject to the strictures of the Water Act, 33 U.S.C. § 1251 *et seq.* which require that each discharge must meet the standards set by a permit (the National Pollution Discharge Elimination System (NPDES) permit), issued pursuant to 33 U.S.C. § 1342.

Each of the Utilities applied for the necessary permits. Orange and Rockland Utilities, Inc. (O & R) applied for a permit for its Bowline Point generating station in March, 1971. Consolidated Edison Company of New York, Inc. (Con Edison) applied for a permit for its Indian Point generating station units 1 and 2 in June, 1971 and for unit 3 in December, 1974. Central Hudson Gas & Electric Corporation (Central Hudson) applied for a permit for its Roseton generating station in February, 1972.*** Scolnick affd. ¶ 21-23 (JA 331-32).****

* For instance, Con Edison's station at Indian Point, Units 1 and 2, uses 1,120,000 gallons *per minute* for condenser cooling water, as well as using water for additional purposes (JA 89). Central Hudson's Roseton station uses over 947 million gallons per day (JA 170).

** References to pages prefaced by "JA" are to the Joint Appendix.

*** Applications filed prior to 1972 were filed with the U.S. Army Corps of Engineers, which administered the permit program under the Refuse Act of 1899, 33 U.S.C. § 407. The Water Act, which was enacted in 1972, transferred jurisdiction over permits to EPA, and thereafter the pending applications as well as new applications were processed by EPA in accordance with the more detailed and comprehensive requirements of the Water Act.

**** Affidavit of Meyer Scolnick sworn to November 30, 1977, with exhibits, submitted in support of EPA's motion for dismissal in the District Court (JA 326-522).

EPA reached tentative determinations on each of the permit applications, and, in accordance with its regulations, 40 C.F.R. § 125.32, made these determinations public, in Public Notices which described the key conditions of the permits. The Notices asked for comments and stated that hearings could be requested, and were issued in May and June, 1974, and (for Indian Point, unit 3) May, 1975. Scolnick affid. ¶ 22, and Exhibits 7, 8, 9 and 10 (JA 332, 370-87).

In due course EPA, after considering the detailed comments submitted by the Utilities and others, reached its final determinations. These were made public by Notices of Issuance of Final Determination, in February and July, 1975. Exhibits A, B, C and D to Block affid.* (JA 88-194). These Notices had annexed to them the final permits. The Notices stated that the final permits would be issued and become effective on specified dates unless a request for an adjudicatory hearing was timely made. The final permits required, *inter alia*, that the heat being discharged be reduced by 90% and also that protective measures to reduce the entrainment of fish be established. In effect, this means that the once-through cooling systems must be eliminated and replaced in all probability by closed-cycle cooling tower systems. (JA 23-24).

Each of the Utilities then filed a timely request for an adjudicatory hearing, stating that they wished to contest certain of the conditions in the permits. Exhibits 11, 12, 13 and 14 to Scolnick affid. (JA 388-511). The requests specified those provisions in the permits which were being contested, and in each covering letter, the utility referred to the permits as "issued." (JA 388, 418, 476, 496).

* Affidavit of Joseph D. Block sworn to October 31, 1977, with exhibits, submitted in support of the Utilities' motion for summary judgment in the District Court (JA 72-251).

EPA responded by granting the requests of the Utilities for adjudicatory hearings, in May, June and August, 1975. The responses were in the form of Public Notices of Adjudicatory Hearings, with covering letters to the applicants. The Public Notices in each case referred to the permits as "issued", as did the covering letters. Exhibits F, G, H and I to Block affid. (JA 199-248). The covering letters, moreover, notified each utility that

The effectiveness of these contested conditions is stayed pending final EPA action pursuant to 40 C.F.R. 125.36. * * *

Please be advised that the conditions of the issued permit not referenced in the Public Notice as stayed are determined to be uncontested, issued and effective. Failure to comply with the uncontested conditions of the permit will result in a violation of the permit.

(JA 200, 214, 226, 238).

After the Utilities received notice that adjudicatory hearings on the contested provisions would be granted, there were numerous meetings and communications between EPA and the Utilities, in an attempt to resolve or narrow the issues between the parties. Most of these exchanges occurred after October, 1975. Scolnick affid. ¶ 33 (JA 335).

On February 22, 1977, a formal pre-hearing conference was held between EPA and the Utilities. At that hearing, the Utilities, *for the first time*, raised the question of whether EPA had jurisdiction to hold the adjudicatory hearing in view of the fact that the general permit-issuing program had been transferred by EPA to the State of New York, Department of Environmental Conservation ("DEC"), *in October 1975*. Scolnick affid.

¶¶ 33, 34 (JA 335). The jurisdictional issue was referred, with other legal questions, to EPA's General Counsel for decision,* and on August 11, 1977 the General Counsel issued his opinion No. 63 ("OGC Opinion 63") which concluded that EPA had jurisdiction to proceed with the adjudicatory hearing. Exhibit A to Complaint (JA 34-65).

The permit-issuing program had, indeed, been turned over to DEC in October, 1975 in accordance with the provisions of Section 402(b) of the Water Act, 33 U.S.C. § 1342(b).** The State of New York had applied to EPA for approval of its own permit program in April, 1974. EPA did not at first approve the program, in part because the State's submissions failed to include a detailed Memorandum of Agreement governing the transition from EPA to State administration of the program. However, by April 28, 1975 such a Memorandum of Agreement was negotiated and included in the State's program. On May 5, 1975 EPA gave public notice and scheduled a public hearing on the State's application. Scolnick affid. ¶¶ 3-9 (JA 327-28).

The Memorandum of Agreement (Exhibit 1 to Scolnick affid., at JA 338-48) set out the procedures which EPA and the State of New York agreed were appropriate to effectuate an orderly and efficient transfer of the complex and ongoing permit-issuing program. It was agreed that adjudicatory hearings on permits issued by EPA prior to the transfer date, or permit modifications required as a result of adjudicatory hearings pending as

* EPA regulations require that issues of law, raised by parties who have been granted adjudicatory hearings, shall be referred to EPA's General Counsel for resolution, and shall not be considered at the adjudicatory hearing. 40 C.F.R. § 125.36(m).

** We give parallel citation to the United States Code only on the first reference to a section of the Water Act.

of the transfer date, should be defended or made, respectively, by EPA. Memorandum of Agreement, at p. 2-3 (JA 339-40).

When EPA gave public notice on May 5, 1975 that the State had applied for permit program approval, it also notified the public that the various state submissions (which included the Memorandum of Agreement) were available for public inspection. See Exhibit 2, p. 2, to Scolnick affid. (JA 350). Moreover, a copy of the Memorandum of Agreement was sent to G.S. Peter Bergan (counsel for Utilities here) at his request on May 16, 1975. (JA 351). None of the Utilities appeared at the public hearing or protested any of the terms of the Memorandum of Agreement at that time.

The transfer took place on October 28, 1975. (JA 354). The Notice of Approval published in the Federal Register on November 24, 1975 again drew attention to the fact that the program would be administered in accordance with the Memorandum of Agreement. Exhibit J to Block affid. (JA 250).

The guidelines in the Memorandum of Agreement have been in fact adhered to. None of the 192 permits for which adjudicatory hearing requests had been granted as of October, 1975 has been turned over to the State. 86 of these matters have been fully resolved by EPA and the remainder are nearing resolution before EPA. Scolnick affid., ¶¶ 19-20 (JA 331-32).

The Utilities filed their complaint against EPA and DEC in District Court on October 5, 1977 seeking to enjoin EPA from conducting the adjudicatory hearing on their permits. The hearing, which the Utilities had requested and were granted well before October 28, 1975, was scheduled to commence in December, 1977. On

November 7, 1977,* they also filed their petition for review in this court pursuant to Section 509(b)(1) of the Water Act, 33 U.S.C. §1369(b)(1). The petition seeks review of the October 29, 1975 "determination" of the EPA Administrator that EPA retain jurisdiction over adjudicatory hearings granted prior to October 1975, and also review of the August 11, 1977 OGC Opinion 63 to the extent it reaches the same determination.

In the District Court action, the Utilities moved on November 1, 1977 for summary judgment on the merits, asserting that EPA lacked jurisdiction to hold the adjudicatory hearings scheduled for December. (JA 69 *et seq.*) The EPA, DEC and intervening defendant Hudson River Fishermen's Association thereupon moved to dismiss the complaint for lack of jurisdiction (JA 323 *et seq.*), on the ground that subject matter jurisdiction lay exclusively in the Court of Appeals by virtue of section 509(b)(1) of the Water Act. Defendants contended that the Utilities' complaint stated a claim cognizable either under subdivision (D) of section 509(b)(1), as involving a determination concerning a state permit program, or alternatively subdivision (F), as involving the issuance or denial of a permit. The District Court granted defendants' motions to dismiss for lack of subject matter jurisdiction, finding that jurisdiction was in the Court of Appeals by virtue of subdivision (F). The District Court did not reach defendants' contention that exclusive jurisdiction lay in the Court of Appeals by virtue of subdivision (D). 444 F. Supp. at 634, fn. 18 (JA 615).

* The November 7, 1977 petition was withdrawn by stipulation of the parties dated November 18, 1977, without prejudice to the filing of a supplemental petition as of November 7, 1977, after the conclusion of the District Court action. Such supplemental petition was filed on February 21, 1978 and is the petition before this Court, and in accordance with the stipulation is deemed filed as of November 7, 1977. (JA 622-32).

ARGUMENT

The issues in this case are before this Court in the context of both a petition for direct review of certain actions of the EPA Regional Administrator (Docket No. 77-4192) and as an appeal from a District Court decision which confirmed that jurisdiction for review of the actions at issue was exclusively in this Court (Docket No. 78-6032). The Utilities characterize the petition they filed as "a protective measure" (brief, p. 20). No attempt is made in Utilities' brief to justify the petition. Indeed, Utilities claim that their complaint does not fit within *any* of the jurisdictional categories for a petition for review (brief, pp. 39-40). Nonetheless it is submitted that the Utilities' claims are properly presented in the framework of a direct review petition.

Accordingly EPA responds first to the issues raised by the petition, and then to the remaining issues raised by the appeal.

POINT I

The Petition for Review is Based on Section 509(b)(1)(D) of the Water Act and is Time Barred.

The petition is premised on the Water Act's grant of jurisdiction to Courts of Appeals to review certain actions of the EPA Administrator. Section 509(b)(1) defines the jurisdiction of the Courts of Appeals:

- (b)(1) Review of the Administrator's action
- (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316
- (b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in

making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day. [Emphasis added.]

The petition, which was filed by the Utilities as of November 7, 1977, states simply that it is brought pursuant to section 509(b)(1) of the Water Act, and does not specify what subparagraph is invoked. The text of the petition, however, specifies that the review sought is of the portion of OGC Opinion 63 which:

determines that jurisdiction to issue certain contested permits conditions [relating to the Utilities' permits] has not been transferred by the Environmental Protection Agency to the New York State Department of Environmental Conservation ("NYDEC") by virtue of the transfer of permit issuing authority to NYDEC in October 1975 pursuant to 33 U.S.C. § 1342(c). (JA 622-23).

Additionally, the petition asks:

. . . . review of the determination of the EPA Administrator, effective October 29, 1975, trans-

ferring permit issuing authority to NYDEC, see 40 Fed. Reg. 54462 (Nov. 24, 1975), on the grounds of the Decision of the EPA General Counsel No. 63 referred to above, which was issued subsequent to ninety days after the transfer of permit issuing authority to NYDEC on October 29, 1975 (JA 623).

EPA's argument, in brief, is that the Utilities' contentions fall squarely within the ambit of subdivision (D) of Section 509(b)(1) of the Water Act, because the Administrator's "determination as to a State permit program" is being challenged. The determination was the agreement (first executed in April, 1975 and approved by the Acting Administrator of EPA on October 28, 1975) by which EPA and the State allocated between themselves the administrative responsibility for conducting the adjudicatory hearings for certain classes of permits. However, that determination as fully set out in the Memorandum of Agreement was made in October, 1975 (not in the 1977 OGC Opinion 63) and therefore the 90-day statute of limitations contained in the last sentence of Section 509(b)(1) bars this petition.

Should the Court nevertheless ignore the lack of timeliness, the Utilities' petition must be denied on the merits, for the Administrator's determination to proceed with these adjudicatory hearings does not violate the directive of Section 402(c)(1) of the Water Act, 33 U.S.C. 1342 (c)(1), that the Administrator "suspend the issuance of permits." See Point III, *infra*.

A. The Utilities' challenge falls within subdivision (D) of Section 509(b)(1) of the Water Act.

The substantive issue here concerns the determination by the Administrator of EPA as to the conditions under which the administration of the permit program was to

be transferred over to New York State. Those conditions were set out in the Memorandum of Agreement which formed part of the State's program. See Statement of Facts, pp. 6-7, *supra*.

Permit programs for control of pollutant discharges are established by Section 402 of the Water Act, 33 U.S.C. § 1342, and that Section also allocates responsibility for the programs between the federal and state governments. By Section 402(a) of the Water Act, EPA is authorized to issue discharge permits to point sources of pollution. The permits must assure compliance with the several enumerated provisions of the Act. Section 402(a)(2) of Water Act. However, the Water Act further provides that States shall assume the Section 402 permit program authority with respect to discharges of pollutants to State waters upon submission to, and approval by, the Administrator of EPA of a State permit program which meets the requirements set out in that subsection. Section 402(b) of the Water Act. Section 402(c) provides that approved State programs shall supersede the federal permit program in those States. Section 402(c)(1) provides:

Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (c) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act.

In the instant case, the particular decision being challenged by the Utilities is whether EPA could continue, after the transfer, to hold adjudicatory hearings on those

permits as to which such hearings had been requested by the permittee and allowed by EPA prior to the effective date of the transfer. It is hard to imagine an EPA determination which fits more clearly under subdivision (D) as a "determination as to a State permit program" than this one.

The Utilities seek to distinguish their claim, however, by contending that the determination they challenge does not concern a State permit program approved pursuant to Section 402(b) of the Water Act, but rather EPA's refusal to stop "issuing" permits, after the transfer to the State has occurred, in contravention of Section 402(c) of the Water Act. The Utilities suggest that Section 402(c)(1) imposes "independent" duties on EPA which are unrelated to state program issues under Section 402(b), at least for purposes of court review.

To the contrary, the two subdivisions of Section 402 are complementary and interrelated. The provisions establish the procedures for approving a state program and then achieving the transfer of an ongoing program from EPA to the State. The Administrator's determinations concerning the meaning of the language in subdivision (c) are as much about a "state permit program" as are his determinations at an earlier stage of the transfer process, to wit the review and approval of the State's program under Section 402(b).

In this instance, the disputed determination is expressly contained in the documents comprising the program submitted by the State and approved by EPA in accordance with Section 402(b). The determination is spelled out in the Memorandum of Agreement which was an integral element of the State's program. Indeed, the State's original permit program was rejected by EPA in part because it lacked such a memorandum. There was no independent, later determination about what the phrase "suspend issuance of permits" meant; the con-

tinued EPA responsibility for permits then scheduled for EPA adjudicatory hearings was an essential ingredient of the approved state program. (Indeed, it is likely that the State would not have sought EPA's approval of its program absent such a division of responsibility. (JA 516-19).) The allegations here do not simply constitute a charge that EPA failed to perform some distinct, non-discretionary duty imposed by Section 402 (c) (1), but rather constitute a challenge to an EPA determination to approve the State program which retained for EPA jurisdiction over these classes of permits.

The situation is similar to that in *California v. EPA*, 511 F.2d 963 (9th Cir. 1973), *rev'd on other grounds*, 426 U.S. 200 (1976), where the Court of Appeals heard a case, brought pursuant to subdivision (D), on the issue of whether the EPA Administrator had power to refuse to approve those portions of the California and Washington permit programs which attempted to take over from EPA the issuance of permits for federal installations. In deciding *inter alia* that it did have jurisdiction, the Court of Appeals commented:

What is challenged here is not a failure to perform any single "act" or "duty" as much as the Administrator's general misinterpretation of the scope of state regulatory jurisdiction under the Act. An action to spell out the scope of state authority granted by the Act seems to be the exact type of challenge that Congress must have contemplated in enacting Section 509.

511 F.2d at 974.

B. The petition under Section 509(b)(1)(D) is however time-barred.

We argued above that the petition must be deemed brought pursuant to subdivision (D) of section 509(b) (1)

because it challenges a decision concerning a state permit program. This being established, however, the inescapable consequence is that the Utilities are time-barred from protesting the Administrator's determination, at this late date.*

The last sentence of Section 509(b)(1) states that an application for direct review by this Court must be made "within ninety days from the date of such determination . . ., or after such date only if such application is based *solely* on grounds which arose after such ninetieth day." [Emphasis added].

In the instant case, the latest date on which it can be said the determination was made is October 28, 1975 ** when the Acting Administrator of EPA approved the State's program, including the Memorandum of Agreement, some *two years* before the Utilities filed their petition challenging the determination. Notice of EPA Approval was published in the *Federal Register* on November 24, 1975. (JA 250).

The Utilities not only had constructive notice of the content of the State program, but also had actual notice as far back as 1975. The general public was given notice (by publication in the *Federal Register* on May 5, 1975) that the State had applied for approval of its program, and informed that the relevant documents describing the pro-

* If this Court should rule that the petition, despite its terminology, does not come within the ambit of subdivision (D), because it concerns a decision about particular permits rather than the details of the transfer of the permit program to the State, it is submitted that the Court's analysis should then focus on subdivision (F) of Section 509(b)(1), which, as indicated below however, is of no help to the Utilities.

** It could indeed be argued that the determination in fact was made even earlier, when the Memorandum of Agreement was executed in April, 1975 or made public in May, 1975. However, the October, 1975 date is the one which the Utilities now claim constituted the cut-off time for all EPA involvement with their permits.

gram, which included the Memorandum of Agreement, were available for inspection. The attorney for the Utilities requested and was sent a copy of the Memorandum of Agreement on May 16, 1975. (JA 351). It should be remembered that the Utilities had by that time already requested that they be given an adjudicatory hearing by EPA on certain provisions in their permits, which they wished to contest. The requests for hearings were made on behalf of Orange & Rockland and Central Hudson in March, 1975 and on behalf of Con Edison's Indian Point Units 1 and 2 in April, 1975. A second request was made by Con Edison with regard to its Indian Point Unit No. 3 in July, 1975. (See JA 388, 418, 476 and 496). By October, 1975 the Utilities were deeply involved with matters relating to the processing of their permits, were knowledgeable about the plan of transfer to the State, and were aware of the decision to have EPA continue to handle adjudicatory hearing on permits such as theirs.

Additionally, EPA continued, openly and with the acquiescence of the Utilities, as well as of the State of New York, to take action with regard to these permits after October, 1975 which is the date that the Utilities now proclaim should have been the cut-off date for any EPA involvement. The Utilities attended meetings and exchanged communications with EPA relating to their objections to certain provisions in the permits and to the anticipated adjudicatory hearings. Not until February 22, 1977, 16 months after the October, 1975 transfer, did the Utilities question EPA's jurisdiction. (JA 26, 335).

On such a record, the petition is time barred because it was not filed within 90 days of the October, 1975 determination. Although Section 509(b)(1) allows a later application to this Court, the application must be "based solely on grounds which arose after such ninetieth day." The OGC Opinion 63 which was issued on August 11, 1977, and which the Utilities refer to in their petition, does not qualify.

The OGC Opinion 63 is not new matter. No new evidence or fact was involved. It does not even enunciate a novel claim of authority or modify a prior position of the agency. The opinion simply reaffirms the EPA authority which was claimed in 1975 and openly exercised, vis-a-vis these Utilities and many others, since 1975. The mere fact that the Utilities chose at a particular time to challenge EPA's jurisdiction and seek a ruling does not transform the ruling into "new grounds" arising as of the date of the ruling. To so hold, indeed, would allow any time-barred claimant to create his own "new ground" merely by seeking an administrative ruling on his claim.

The time limitation imposed by the last sentence of Section 509(b)(1) is short, but it is strictly enforced. See *Sun Enterprises, Ltd. v. Train*, 532 F.2d 280, 291 (2d Cir. 1976); *Peabody Coal Co. v. Train*, 518 F.2d 940 (6th Cir. 1975). Congress, without a doubt, was determined to have issues of importance relating to EPA administrative actions determined at the highest judicial levels and with the utmost promptness. As stated in *Peabody Coal*, where the 90 day limit was held a bar to a petition filed just 92 days after the challenged action concerning the state permit program:

The legislative history of this Act shows that Congress desired a clear and prompt time schedule for applications for judicial review. S.Rep.No.92-414, 92d Cong., 2d Sess., 1972 U.S.Code Cong. & Admin.News pp. 3668, 3750-51. The judicial review provisions as originally drafted in both H.R. 11806 § 509 and S. 2770 § 509 provided for a 30-day time limit in which to file a petition for review. In the final version the time limit was extended to 90 days, but the emphasis upon specific time limitation remained.

We believe the sense of urgency concerning environmental protection portrayed in the Act we now construe was equally present in the Clean Air Act, See 42 U.S.C. §§ 1857 and 1857h-5(b)(1)

(. 970), and that cases enforcing the statutory time limits contained therein are precedent for our present decision. *Granite City Steel Co. v. EPA*, 501 F.2d 925 (7th Cir. 1974). See also *Union Electric Co. v. EPA*, 515 F.2d 206 (8th Cir. 1975); *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125, 93 S.Ct. 937, 35 L.Ed.2d 256 (1973).

518 F.2d at 942-3.

Consequently, this Court has no jurisdiction to hear petitioners' claim, which can only be construed as arising under Section 509(b)(1)(D) of the Water Act, because the petition was not filed within the statutory time limit.

POINT II

If, Alternatively, the Petition States a Claim Under Subdivision (F) of Section 509(b)(1) of the Water Act, the Claim is Premature.

It is EPA's position that the petition is best described as stating a challenge, albeit time-barred, to an EPA determination regarding a State permit program and so fits within subdivision (D) of Section 509(b)(1). However, there is another subdivision of Section 509(b)(1) which could arguably form a basis for a petition to this Court at some time in the future, and that is subdivision (F). Subdivision (F) prescribes Court of Appeals review of actions of the Administrator "in issuing or denying any permit. . . ." Here, the Utilities are contending that the Administrator should cease further administrative action with regard to the contested portions of their permits; thus they are challenging actions of the Administrator which when completed would give rise to fully effective NPDES permits which are reviewable under subdivision (F).

In the court below, the Utilities strenuously denied that either subdivision (F) or subdivision (D) could be applicable, and the defendants argued that one or the other encompassed the general subject matter of the complaints advanced by Utilities. The District Court decision considered subdivision (F) at length, ruled that the subdivision could form a proper basis for a petition to the Court of Appeals, and thereupon decided it was unnecessary to rule on the applicability of subdivision (D). The court below specifically reserved the question of whether a petition under subdivision (F) would be premature, deferring the resolution of that question to this Court. (JA 604). So, even though the Utilities' petition is not based on subdivision (F), and the Utilities continue to deny its applicability, (Utilities' brief, p. 39) EPA now shows that this subdivision (although a less fitting one than subdivision (D)) might ultimately constitute an alternative basis for the petition. However, reliance on subdivision (F) now is premature.

The Utilities have argued that subdivision (F) cannot apply because no permits have yet "issued". They assert that issuance of permits is not complete until "final" agency action has taken place, and this means completion of the adjudicatory hearings pursuant to 40 C.F.R. § 125.36. However, the status of the Utilities' permits—whether yet "issued" or not—is irrelevant in determining whether the challenged administrative action falls within the purview of subdivision (F). If the Utilities were to wait until the adjudicatory hearings are over, a determination made and all the permit conditions declared effective or modified (and thus indubitably "issued" even under the Utilities' interpretation of the word), they would obviously be able to obtain direct judicial review in this Court. However, they chose instead to bring suit now, prior to final administrative action on the contested permit conditions. It is the Utilities' own decision to bring suit at this stage of the permit process which cre-

ates the basis for the argument that this Court lacks direct review jurisdiction under subdivision (F) because no permit has yet "issued." If such a rationale were allowed to prevail, the filing of a suit by a permittee before all permits are final in all respects would always serve to circumvent Court of Appeals review under subdivision (F).

In any event, the permits have "issued." Under EPA regulations, "issuance" occurs when a determination pursuant to 40 C.F.R. § 125.35 is made. What remains thereafter is merely the resolution of the adjudicatory hearing on contested portions of the issued permits which, when completed, will constitute final administrative action on those provisions and make them reviewable (as re-issued provisions) by this Court. 40 C.F.R. § 125.35(d) (2). (See Point III below for a full discussion of why the permits must be deemed "issued".)

By making the argument that the Utilities' claim already falls into the category of actions described by subdivision (F) of section 509(b)(1), because the case involves "issued" permits, EPA in no way concedes that a petition for review invoking subdivision (F) may be heard at this time by this Court. While the Utilities' attack on the terms of the October, 1975 transfer of the program to the State is too late, an attack on the terms of their permits would be too early. Under EPA regulations, as noted above, when an applicant seeks an adjudicatory hearing, the contested portions of the permit do not become final for purposes of judicial review (unlike the uncontested provisions). Nor is the matter ripe for review even apart from the Agency's regulations regarding finality. The hearings must be concluded and an administrative determination reached, before Court review is appropriate. *Abbott Laboratories v. Gardner*, 387 U.S. 136, (1967). In *Abbott Laboratories* the Supreme

Court articulated a methodology for deciding when an administrative agency's decision becomes ripe for review:

The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

387 U.S. at 149.

Here, the particular question is a legal issue (the jurisdiction of the administrative agency to conduct hearings), on which the position of the agency is clear and has been finally stated. However, this is not enough to constitute ripeness.

Thus, the issues here are fit for judicial review in the sense that they present concrete legal questions, but are not fit for judicial review in the sense that the actions challenged are part of a continuing agency decision making process which has not yet resulted in an order requiring compliance by the petitioners.

Bethlehem Steel Corp. v. EPA, 536 F.2d 156, 161 (7th Cir. 1976). Further, as this court (Kaufman, C.J.,) recently observed, a dispute as to an agency's jurisdiction must await "ripening", just as much as other types of issues, and "... it is proper for a court to defer examination of such difficult questions of agency jurisdiction until a party has fully exhausted its administrative remedies." *Marshall v. Northwest Orient Airlines Inc.*, Dkt. No. 77-6103, -6112, slip op. 2369, 2373 (2d Cir. Apr. 7, 1978).

The Utilities have in effect conceded that the doctrine of ripeness, together with EPA regulations about finality (40 C.F.R. §§ 125.36(m) and (n)), prevent them from petitioning this Court for review of their permits pursuant to subdivision (F) at this time. (Utilities' brief pp.

41, 48). Although the concession is used to buttress their plea for District Court jurisdiction, it is nonetheless an acknowledgement that they are not entitled at this time to review of their permits by this Court.

POINT III

Section 402(c)(1) of the Water Act Does Not Bar EPA From Conducting the Adjudicatory Hearings on the Utilities' Permits.

If this Court should conclude nevertheless that the Utilities' petition is not time-barred or premature, the merits of their claim must then be assessed.

The gist of the Utilities' complaint is that EPA should have, but failed to, transfer to the New York DEC the handling of the adjudicatory hearings on their protests about some of the provisions, or "conditions", of their permits. The Utilities contend that Section 402(c)(1) of the Water Act mandated an abrupt and arbitrary cessation of all further EPA proceedings with regard to their permits as of October 28, 1975 when the permit-issuing program was turned over to DEC.

The Utilities argue that the words "shall suspend the issuance of permits" in Section 402 (c) (1) require the immediate transfer from EPA to the DEC of any remaining administrative involvement with permits which have not yet become final for the purpose of judicial review, regardless of the stage of such proceedings and how much waste and delay such a transfer could cause. EPA and the State of New York maintain, on the other hand, that EPA can lawfully retain jurisdiction over proceedings concerning permits which had already reached a particular, advanced administrative stage prior to the 90 day deadline of Section 402(c)(1). That stage is the point where a determination pursuant to 40 C.F.R.

§ 125.35 has been made, because at that point a permit is deemed "issued" under EPA regulations. The permits involved in this suit fall into this category. This is the division of responsibility reflected in the Memorandum of Agreement between EPA and New York. Retention in federal hands of proceedings subsequent to that determination, here the adjudicatory hearings, insures a smooth transition from the federal to the State program with a minimum of duplication and delay, fulfills the expressed intent of the Congress, and promotes the rights and prerogatives of the State in that an orderly, cooperative transfer of authority enhances, rather than detracts from the State role and facilitates rapid attainment of the ambitious goals of the Water Act.

The Utilities' contention is that their permits are not yet "issued", and cannot be deemed "issued" until after the termination of the adjudicatory hearings and after the last administrative act has taken place which would entitle the permittee to judicial review. Thus, they argue, "issuance" remains in the future and EPA must suspend its activities.

EPA's and the State's interpretation of when a permit is deemed "issued" derives from EPA regulations. The regulations provide that, after receipt of an application for a permit, EPA's regional staff formulates tentative determinations with regard to the application and prepares a draft permit. 40 C.F.R. § 125.31. Public notice of the draft permit is given and an opportunity for a public hearing provided. 40 C.F.R. § 125.32. If the Regional Administrator finds a significant degree of public interest in a permit, or finds that useful information can be obtained thereby, a public hearing on the permit is held pursuant to 40 C.F.R. § 125.34. The Regional Administrator then makes his determinations with regard to the permit. 40 C.F.R. § 125.35. At this point the permit is issued. Uncontested provisions of the per-

mit are deemed to be effective. If the permittee objects to the provisions of the permit, he may file a timely request for an adjudicatory hearing under 40 C.F.R. § 125.36. By so doing, the contested provisions of the permit are stayed. 40 C.F.R. § 125.35(d)(2).*

The purpose of the adjudicatory hearing is to "reconsider" the contested conditions in the permit. 40 C.F.R. § 125.36(b)(1). Subsequent to the adjudicatory hearing held pursuant to 40 C.F.R. § 125.36, the Regional Administrator makes an "initial decision", which may then be appealed to the Administrator. For the purpose of judicial review of the permit, final agency action is not deemed to occur until the Administrator either denies review or issues his decision. 40 C.F.R. § 125.36(n)(6).

With respect to all four of the permits involved here, draft permits were prepared and notice provided, opportunity for a public hearing was given, and determinations were made pursuant to 40 C.F.R. § 125.35. All of these events occurred prior to the transfer of permit issuing authority to the State. While certain provisions of the permits are the subject of adjudicatory hearing requests and are stayed, other provisions are uncontested and are currently effective and enforceable.** Thus, each permittee currently holds a federal permit, in part effective and in part stayed. It is therefore clear that under

* While the regulations may in some places be imprecise, the fact that permits are issued upon the filing of the Regional Administrator's determinations under 40 C.F.R. § 125.35 is demonstrated by the fact that a request for an adjudicatory hearing *stays* the effectiveness of the contested provisions. 40 C.F.R. § 125.35(d)(2). If the permits were not issued then, there would be no need for stay.

** See, for instance, conditions 9(a), 9(b)(1)(c), 9(b)(2), and 9(b)(3) of the O&R permit, which establish certain initial effluent limitations with regard to the Bowline Point facility, and conditions 12(a) and 12(b) which establish a sampling schedule for such discharges. (JA 154-59).

agency regulations the Utilities' permits were "issued" prior to the date by which EPA had to suspend the issuance of permits under Section 402(c) (1) of the Water Act.

Nor can the Utilities claim ignorance of EPA's regulations or position that the permits were "issued" on the dates specified in the Notices of Issuance of Final Determination. The requests for adjudicatory hearings filed by the Utilities ask that the terms of the permits with respect to the contested issues be stayed, by implication conceding that the permit was issued, and some of its provisions effective. (JA 417, 470, 476, 496). The request filed by O & R indeed clearly distinguishes between the "draft NPDES permit" transmitted by EPA on May 22, 1974 and the "NPDES permit issued" on February 24, 1975 on which it sought the hearing. (JA 393). The covering letters sent by attorneys for the Utilities along with the requests refer in each instance to "issued" permits. (JA 388, 418, 476, 496). The letters from EPA to the Utilities granting the requests for adjudicatory hearings described the permits as "issued", and granted a stay of the effectiveness of the contested provisions of the permits. The letters specifically advised the Utilities that:

. . . [T]he conditions of the issued permit not referenced in the Public Notices as stayed are determined to be uncontested, issued and effective. Failure to comply with the uncontested conditions of the permit will result in a violation of the permit.

(JA 200, 214, 226, 238). The Public Notices of the grant of adjudicatory hearings, similarly, refer to "the issued NPDES permit" and provide for a stay of effectiveness only of the contested provisions. (JA 208-09, 221, 233, 245).

Despite all the above-cited regulations and facts, the Utilities insist that their permits were not "issued" by October, 1975. Utilities' brief at 25-28. Their chief reliance for this contention is on Section 402(a)(1) of the Water Act which provides that issuance of permits by EPA shall be "after opportunity for public hearing." The Utilities contend that the public hearing referred to must be the adjudicatory hearing, and they have not yet had that hearing. Consequently, their permits cannot be classified as "issued". However, this argument ignores the fact that the Utilities (and the public) have already been given an opportunity for a public hearing pursuant to 40 C.F.R. § 125.34. This opportunity occurred in advance of the issuance of the permits under 40 C.F.R. § 125.35. EPA asserts that this opportunity for hearing on the tentative permits is sufficient compliance with the requirements of section 402 (a) (1) to allow EPA to initially issue permits.

Of course, the Utilities, as permittees, and others have additional rights and may also further challenge the terms and conditions of the permits after they have been initially issued, in the context of the adjudicatory hearings provided by 40 C.F.R. § 125.36.

The Utilities' citation to *U.S. Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977), *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977) and *Seacoast Anti-Pollution League v. Costle*, Dkt. No. 77-1284 (1st Cir. Feb. 15, 1978) do not advance their claim. Nothing in these cases suggests that it is improper for EPA to initially issue permits prior to the adjudicatory hearing, subject to further consideration and possible modification and reissuance of contested provisions of such permits, so long as the permittee is not legally bound, in the interim, by any of the contested permit provisions. In fact, in the *U.S. Steel* case, the Seventh Circuit noted that the permit for the company's Gary Works was "initially issued" in October,

1974, was then the subject of an adjudicatory hearing, and was subsequently "reissued". 556 F.2d at 831.

In each of the cited cases, the question before the court was whether the standards of the Administrative Procedure Act must be applied to adjudicatory hearings being conducted pursuant to 40 C.F.R. § 125.36. While there are, concededly, references in these decisions to the fact that the adjudicatory hearings are being held pursuant to the requirement imposed by Section 402(a)(1), the courts did not analyze or determine any question having to do with the relationships of 40 C.F.R. § 125.34-36 or EPA's regulatory scheme for staged issuance and review of permits. Indeed a finding that the APA does apply to adjudicatory hearings under § 125.36 would not be inconsistent with a finding that permits are initially issued when the 40 C.F.R. § 125.35 determinations are made.

However, even accepting the Utilities' mechanistic view of Section 402(a)(1) which would equate "issued" with "final for purposes of judicial review", it does not follow that Section 402(c)(1) ordained that any permit with respect to which such final administrative action has not been taken by the date set in Section 402(c)(1) must be transferred to the State. Nothing in the statute or the legislative history supports the Utilities' interpretation. In fact, where Congress meant to refer to "final administrative disposition" it did so explicitly, as in Section 402(k) of the Water Act.* The legislative history cited by the Utilities merely emphasizes the importance of Section 402(b) and the fact that State permit programs were meant to supersede the federal program, a point which is not in dispute.

* See *Law Motor Freight, Inc. v. CAB*, 364 F.2d 139, 144 (1st Cir. 1966), cert. denied, 387 U.S. 905 (1967); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 629-30 (D.C. Cir. 1973); *Duquesne Light Co. v. EPA*, 481 F.2d 1, 6 n.27 (3d Cir. 1973).

Rather than being a fixed and precise formula, the phrase "suspend the issuance of permits" in Section 402 (c) (1) of the Water Act was meant by Congress to be interpreted by EPA so as best to carry out the clear Congressional purpose that whenever possible states be given primary responsibility for permit issuance and that assumption of this responsibility occur as rapidly as practicable. But Congress also intended to create a statute which would as expeditiously as possible lead to a clean-up of the Nation's waters. As noted by Senator Muskie:

The purpose of this bill is to set rapidly in motion an effective water pollution control program. The Act sets tight time limits within which the Administrator must take a multitude of actions, each heavily dependent on the other, that will in the aggregate, produce a meaningful, effective, and truly workable program as quickly as possible.*

The stringent deadlines in the Water Act, such as the original ** 1977 and 1983 dates for attainment of increasing levels of pollution control established by Section 301 of the Act, 33 U.S.C. § 1311, required that the permit program function smoothly and efficiently. Thus, Congress was determined that the Section 402 program operate effectively and with a minimum of duplication and delay. For example, Congress provided in Section 402(a) (4) that applications for permits under the Refuse Act pending on the date of enactment of the Water Act would be deemed applications for NPDES permits.***

* *A Legislative History of the Federal Water Pollution Water Pollution Control Act Amendments of 1972* (Committee print; hereafter "Leg. Hist."), at 182.

** The December, 1977 amendments to the Water Act have in general extended the second date by one year. See 33 U.S.C. § 1311(b) (2) as amended.

*** The purpose of this provision was to "preserve the momentum of the Federal permit program already underway." Leg. Hist. at 854 (House Report).

Similarly, Section 402(a)(5) authorized the Administrator to permit States capable of administering their own permit programs to assume permit issuing authority right from the start, without a transitional federal program. The Section 402 permit program was envisioned as "a reasonable and efficient way to avoid duplication and get the job done. . . ." Leg. Hist. at 428 (remarks of Rep. Ichord). As the House Committee on Public Works observed, "[a] system of permits which requires duplicate efforts . . . is wasteful and nonproductive." Leg. Hist. at 812. *See also* Leg. Hist. at 1490 (Senate Report).*

It was therefore left to EPA, working with the States, to transform generalized Congressional goals into practical reality. The interpretation and practical implementation of the Water Act by EPA, particularly where reliance has been placed on that interpretation, must be accorded deference by reviewing courts. As recently reiterated by the Supreme Court in a case involving this Act:

We therefore conclude that the Agency's interpretation . . . was "correct", to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction

* Similarly, Congress intended that permits be issued as promptly as possible. *See, e.g.*, Leg. Hist. at 176 (statement of Senator Muskie that purpose of Section 402(d)(3) is to insure "that the permit can be expedited"). To the same effect is Section 402(a)(1), which authorizes permit issuers to require compliance with enumerated sections of the Act "prior to the taking of necessary implementing actions" (*i.e.* promulgation of regulations). *See* Leg. Hist. at 813 (House Report).

was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for the Agency.

E. I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 134-35 (1977), quoting *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975).^{*} Here both EPA and New York have relied on the agency's interpretation of Section 402(c)(1) of the Water Act, EPA by engaging in months of preparation for hearings and New York by focusing its resources on other matters. The agency's interpretation, concurred in and relied upon by the State, allows for the smooth transition from federal to state permit program which obviously was desired by Congress. Moreover, the State, in the name of whose interests the Utilities cast much of their argument, agrees with EPA's implementation of Section 402(c)(1) and has relied upon it in launching its own permit program. Sudden transfer of these and other permit proceedings could significantly disrupt the State program.^{**} Here, the Utilities' forced interpretation of Section 402(c)(1) would place a major obstacle in the way of achieving the goals of the Act. Months of EPA preparation for the adjudicatory hearing

^{*} See *American Meat Institute v. EPA*, 526 F.2d 442, 450 n.16 (7th Cir. 1975).

^{**} In a letter dated April 15, 1977 from DEC to EPA in which DEC expressed its support of EPA's position, at the time OGC Opinion No. 63 was being argued, DEC states:

The permittees . . . seek to nullify on important basis of the determination by the State of New York and the Department to accept the responsibilities of the permit issuing program. In the event that USEPA's General Counsel should adopt the permittees view, the Department would have to seriously reexamine its ability to continue administration of this program in light of the very substantial additional demands that would be placed upon it with respect to the adjudicatory hearings arising out of permits issued by USEPA. (JA 518).

would be wasted while the State would be forced to duplicate much of this effort. Extensive delays in completing the administrative procedures concerning these permits could be anticipated. In sum, as stated in the Supreme Court's ruling in *E. I. duPont de Nemours & Co. v. Train*, *supra*, that EPA has authority to issue binding national standards under Section 301 of the Water Act, the Utilities' contention is weakened in part by the fact that "[t]he petitioners' view of the Act would place an impossible burden" on the responsible agency and would frustrate the statutory goals. 430 U.S. at 132.

The Utilities' interpretation of the Act could have severe detrimental effects on other proceedings as well. In the Utilities' view, should even the most minor actions remain to be taken on a permit the proceedings must be transferred under Section 402(c)(1), even though the result would be that months or years of prior administrative proceedings would be rendered meaningless. The result of the transfer they envisage would be duplication of federal and State efforts, waste of limited resources and loss of precious time. The Utilities expound at length on their wish to reach a speedy determination on their permits, yet urge a course which would produce the exact opposite result.

Moreover, once determinations have been made pursuant to 40 C.F.R. § 125.35, uncontested permit conditions are effective. Subsequent transfer of proceedings to a State would lead to a hybrid permit, whose conditions might not be fully consistent. Since State procedures need not parallel federal ones,* sudden transfer of pro-

* Compare 40 C.F.R. § 125.36 with 40 C.F.R. § 124.36. The lack of parallel procedures stems, in part, from the fact that a State's permit program is a separate and independent exercise of State authority. See, *Mianus River Preservation Comm. v. Administrator, EPA*, 541 F.2d 899 (2d Cir. 1976). The separateness of a State's program, however, reinforces the concern that the creation of hybrid permit—part Federal, part State—not be encouraged if the Water Act's ambitious requirements are to be attained.

ceedings could also create confusion and complicate subsequent administrative proceedings and judicial review. While the Utilities ignore these practical problems, severe hardship could be created for the other permit applicants who are undergoing adjudication hearings, who could unwillingly be forced to suffer financial and other losses due to delay and duplication of effort.

EPA, the agency charged with implementation of this complex and very demanding statute, has adopted a construction of Section 402(c)(1) which is eminently logical and which was specifically agreed to and has been relied upon by the State. The interpretation complies with Congressional intent by facilitating a smooth and efficient transfer of authority to NPDES states. Given the cryptic nature of the statutory command and the lack of Congressional attention to the specific question presented here, the agency's interpretation is, under established principles of statutory construction in the environmental area, the "correct" one. *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). As stated in *California v. EPA*, *supra*, 511 F.2d at 971:

When we are faced with two alternative readings of an act, we should be reluctant to attribute to Congress a conscious choice in favor of the less efficient one, at least when there is no constitutional compulsion to do so.

POINT IV

The District Court Correctly Ruled It Lacked Jurisdiction.

The Utilities are also appealing from the decision of the District Court that it lacked jurisdiction over the subject matter of their suit because such jurisdiction was exclusively in this Court by virtue of Section 509(b)(1) of the Water Act. It becomes obvious from the discus-

sions in Points I and II, *supra*, why the Utilities argue so earnestly that the District Court had jurisdiction: their petition to this Court is untimely. In any event, the District Court ruled correctly that it lacked subject matter jurisdiction and that decision must be affirmed.

It is well-established that, where Congress has specifically designated the Court of Appeals for judicial review of administrative action, absent extraordinary conditions,* that forum is exclusive. *Anaconda Co. v. Ruckelshaus*, 82 F.2d 1301, 1304-1305 (10th Cir. 1973). See also *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Nader v. Volpe*, 466 F.2d 261, (D. C. Cir. 1972). Thus, the statutory provision adopted by Congress in the Water Act for direct judicial review by the Court of Appeals is sufficient to foreclose otherwise allegedly existing general equity, mandamus, or federal question jurisdiction in the District Court. If the contested action falls within any of the categories described in Section 509(b) (1), the appropriate and *exclusive* forum for its review is the Court of Appeals. *Sun Enterprises, Ltd. v. Train*, 532 F.2d 280, 287 (2d Cir. 1976); *American Petroleum Institute v. Train*, 526 F.2d 1343, 1345 (10th Cir. 1975); *American Paper Institute v. Train*, 381 F. Supp. 553 (D.D.C. 1974).

The Utilities point to Section 505 of the Water Act, 33 U.S.C. § 1365, to show that a litigant's District Court rights under statutes other than the Water Act can be preserved. That section, we submit, simply has no application here. The Utilities did not base their action on that section,** which permits citizen suits against persons

* The running of the limitations period could not itself be such an "extraordinary condition" without undermining the conceptual validity of any statute of limitations.

** The Utilities could not have utilized Section 505, since they had not met the procedural prerequisites for such a suit set by Section 505(b).

or agencies who are in violation of an effluent standard (Section 505(a)(1)), and suits against the EPA Administrator for failure to perform non-discretionary duties (Section 505(a)(2)). Accordingly, contrary to their assertion, the savings clause in Section 505(e) is of no avail to the Utilities. Rather, as EPA has demonstrated, the Utilities' suit fits within Section 509, which contains no savings clause. Thus, no jurisdiction remains in the District Court, whether under Section 505 of the Water Act or under other federal statutes. *Sun Enterprises, Ltd. v. Train, supra*.

It follows also, as the District Court correctly concluded, that if the Utilities' claim falls within Section 509(b)(1)(F) the related threshold questions of timeliness and exhaustion of administrative remedies are for the circuit court to decide as well. 444 F. Supp. at 631 (JA 604-05).

The Utilities nevertheless say that the District Court's jurisdiction derives from 28 U.S.C. § 1331, the "federal question" jurisdiction. They argue that while EPA's actions may someday be subject to direct review by this Court under Section 509(b)(1), the District Court retains jurisdiction over "improper agency action prior to maturation into one of the specific categories of actions over which the Courts of Appeals have jurisdiction pursuant to § 509(b)(1)". (Appellants' brief, p. 48). This novel theory* would, if applied as the Utilities suggest,

*The Utilities cite as authority for this proposition *Natural Resources Defense Council, Inc. v. Calloway*, 524 F.2d 79 (2d Cir. 1975). That case does not involve in any way a matter which was or would "ripen" into an action covered by Section 509, and dealt solely with issues concerning the scope of section 505 of the Water Act.

neatly dispense with the requirements of ripeness and finality in either court, as well as with the Water Act's division of responsibility between district and appellate courts.

We note, first, that the proposition is useful only if the Utilities' claim is deemed the type of challenge described in subdivision (F) of Section 509(b)(1), where there is an issue of prematurity. But as shown in Point I(A) *supra*, the challenge in reality falls within subdivision (D). Thus, the Utilities were asking the District Court to take jurisdiction over a matter which is *time-barred* rather than premature in the Court of Appeals.

But their proposition must also fail if their claim falls within subdivision (F). The gist of their theory appears to be that the District Court must have "federal question" jurisdiction during the interim period, prior to the exhaustion of the administrative proceedings and the "ripening" of a Section 509(b)(1)(F) case, solely because the Utilities are suffering irreparable harm since they are being forced to appear before an agency which allegedly has no jurisdiction. But, even if these premises were true (EPA denies both the irreparable harm and the absence of agency jurisdiction), they are not sufficient to create present jurisdiction in the District Court. The claim that EPA is acting under a mistaken assumption of agency jurisdiction does not of itself alter the Water Act's allocation of responsibility between district and appellate courts. Indeed, as stated in *American Petroleum Institute v. Train*, *supra*, 526 F.2d at 1345, a question about EPA's jurisdiction under the Water Act is precisely the sort of issue which was intended to be heard by the Court of Appeals under Section 509 rather than by the District Court:

API says that the court of appeals does not have jurisdiction because the Act does not authorize the Administrator to promulgate § 301 regula-

tions imposing effluent limitations on existing sources. The argument is beside the point because the Administrator has not only claimed the power but also has acted to promulgate regulations under § 301. Our present concern is with the jurisdiction of the court of appeals—not with the statutory authority of the Administrator.

Existence of jurisdiction must not be confused with the exercise of that jurisdiction. By enacting § 509(b) Congress established a statutory plan to be followed in obtaining review of agency actions under the Act. Only those courts upon which Congress has bestowed authority have jurisdiction. *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 420, 422, 85 S.Ct. 551, 13 L.Ed.2d 386. In the instant case, jurisdiction is incident to a federal statute granting the right of an interested person from within the circuit to file a petition in the court of appeals to review agency action. See *The Fair v. Kohler Die Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716. The validity or invalidity of that action has no bearing on jurisdiction. In the exercise of its statutory jurisdiction, the court determines whether the Administrator acted within his statutory authority.

In its opinion below, the District Court observed that cases such as *Leedom v. Kyne*, 358 U.S. 184 (1958) and *Pepsico, Inc. v. F.T.C.*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973) did not aid the Utilities. In *Pepsico*, the plaintiffs' action was dismissed, as we urge here, for lack of subject matter jurisdiction, and in *Leedom*, the action was permitted to proceed in the District Court because, given the extraordinary circumstances there, reliance on the statutory provision for circuit court review would have rendered meaningful protection of the plaintiff's rights illusory.

The guiding principle for permitting the exceptional remedy of interlocutory judicial review in the District Court was stated in *Leedom v. Kyne*, 358 U.S. at 190, quoting from *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 300 (1943):

'If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing general jurisdiction of those courts to conform with it was the purport of the decisions of the Court in *Texas & New Orleans R. Co. v. Brotherhood of Clerks*, 281 U.S. 548, and *Virginian R. Co. v. System Federation*, 300 U.S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose.'

In *Leedom*, absence of district court jurisdiction would have meant that plaintiffs would have had no access to a court for redress against an agency action which was clearly in excess of the agency's powers. The direct review provisions of the National Labor Relations Act, 29 U.S.C. § 160(e) and (f), were not then available to plaintiffs, and not likely to become available.

In *Pepsico*, the Court simply accepted, for the sake of argument, a proposition derived from *Leedom* but concluded on the particular facts of the case before it that the appellants had not brought themselves within "the possibly over-generous principle with respect to review-

ability that we have put forward". 472 F.2d at 187. The same principles were utilized, recently, by this Court in *Association of National Advertisers, Inc. v. F.T.C.*, 565 F.2d 237 (2d Cir. 1977), in which the Court concluded that the District Court lacked jurisdiction where appellant would have ample future opportunity to challenge the ruling it objected to, and suffered no substantial deprivation of rights or irreparable injury meanwhile and thus did not fall within the exceptions described in *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), and *Leedom v. Kyne*, *supra*.

In the instant case, the absence of District Court jurisdiction can not even remotely be thought to obliterate any right given the Utilities by Congress. The Utilities will, in due course, have full access to the appropriate court. There is no uncertainty about whether their claim, if within the ambit of subdivision (F) as relating to the issuance of their permits, will qualify for direct review. The Utilities themselves conclude that it will, and contend merely that they are being harmed by having to wait for the completion of the administrative proceedings.

The Utilities try to boot-strap their pleas for District Court review by raising the spectre of irreparable injury should the question of agency jurisdiction not be resolved at this time. However, the injuries asserted are largely speculative and illusory. The Utilities are not currently subject to the contested permit conditions, their effectiveness having been stayed pending the conclusion of the administrative process. Whether or not the Utilities will ever be required to install the cooling towers (the action called for under the contested provisions) remains to be determined. If that eventual determination is adverse to the Utilities, they can challenge it in court pursuant to Section 509(b)(1)(F) of the Water Act, and questions of EPA's jurisdiction over their permits, if they are to be

heard at all at this late date,* will then also be reviewable. However, the expense or inconvenience of having to participate in even a lengthy administrative hearing does not of itself constitute irreparable injury. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938).

The Utilities assert that whatever the outcome of the current administrative proceedings, the jurisdictional issue will remain as a latent defect in the proceedings and therefore is certain to be litigated later (Utilities' brief, p. 19). This is not so. Should the Utilities prevail on the merits in the administrative proceedings, it is inconceivable that any of the other parties could mount a successful challenge to EPA's jurisdiction since all other significant parties to the proceedings—EPA, the State, the Intervenor—have asserted before the District Court and this Court that EPA has jurisdiction.

The Utilities have also referred to the inflexible nature of the 1984 deadline as an element of the purported immediate injury. While it is true that courts have rejected certain arguments for blanket extension of the Water Act deadlines, there may be unique circumstances where rigid enforcement of such dates may not be appropriate. *See State Water Pollution Control Board v. Train*, 559 F.2d 921, 927 (4th Cir. 1977). Should the Utilities ultimately be required to install cooling towers as a result of an EPA determination, good faith efforts by the Utilities to meet these requirements by the 1984 date could be taken into account in any EPA enforcement action.

* We note, again, that EPA's primary contention is that the question of EPA's jurisdiction falls within subdivision (D), and thus the Utilities in fact are time-barred from ever raising the question.

In sum, the Utilities can not show that, by being required to follow normal principles of exhaustion of administrative remedies and await the ripening of their claim under Section 509 of the Water Act, they will suffer irreparable harm or that they will be foreclosed from access to a court in due course. Accordingly, there are no special circumstances necessitating District Court jurisdiction.

CONCLUSION

The foregoing reasons, the petition in Docket No. 77-4192 should be dismissed, and the judgment of the District Court in Docket No. 78-6032 should be affirmed.

Dated: New York, New York
April 24, 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

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Marian J. Bryant being duly sworn,
deposes and says that s he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
26th day of April 1978 she served/~~xxxxxx~~ of the
within Brief of Respondents-Appellees EPA, Costle and Beck

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